

January 22, 1996

P.S. Protest No. 95-37

FEDERAL PROPERTIES OF R.I., INC.

Solicitation for Proposals/Existing Space and Construct and Lease Block Island, RI

DIGEST

Protest against lease award is sustained in part; award was not made in accordance with the solicitation's description of the preferred geographic area. Since the error could have been remedied if detected before award, and other grounds for protest are either denied or dismissed for lack of subject matter jurisdiction, no prejudice to protester occurred and substantive relief is not warranted.

DECISION

Federal Properties of R.I., Inc., (Federal Properties) protests the award of a lease agreement for a new main post office for Block Island, RI, to Edward and Dawn Phillips (Phillips). Federal Properties is the lessor of the current Block Island post office, a 2,021 square foot building on a 22,500 square foot site.

The Facilities Service Office, Windsor, CT, issued a "Solicitation for Proposals/Existing Space and Construct and Lease" on May 8, 1995, and placed advertisements in local newspapers seeking proposals for a site for a new Block Island facility. Initial proposals were due June 15.¹

¹ Before issuing the solicitation, the Postal Service had negotiated with the protester for a lease extension and discussed possible renovations at the current site. In the course of its protest, Federal Properties objected to the manner in which those negotiations were conducted.

At the eleventh hour, on April 28, 1995, (upon the exhaustion of our costly legal approval efforts since December 1994) [the Postal Service] advised of the need for a 2,000s.f. addition [to the existing facility] (instead of 1,000s.f.) for a total of 4,000s.f. and that an open solicitation would be made for a new facility. . . . [T]his conclusion [sic] indicates that all of the Postal Service pre-requisites, including planning, market studies and analyses were set aside and that the Postal Service proceeded with a bias to relocate

The solicitation sought a facility with approximately 4,000 square feet of net interior space, 18,790 square feet for a driveway, parking and maneuvering area, 610 square feet for a platform, and a minimum of 34,153 square feet for the site, "excluding setbacks, easements, etc." Offerors had to own or control their proposed sites, and could propose either to provide existing buildings or to construct facilities to be leased. Offers were to specify an annual rental rate for a basic lease term of 20 years with four renewal options of five years each.

The solicitation box with the printed heading "Preferred Area" contained the following typed description:

approximately	North: Corn Neck Road
	South: Old Town Road
	East: Water Street
	West: Ocean Avenue ^[2]

Paragraph 6 of the solicitation stated:

AWARD: Any award made under this solicitation will be made to the responsible offeror whose proposal for the cost, location, lease terms, overall project economics, operational benefits, past job performance, and other factors is most advantageous to the Postal Service. The Postal Service reserves the right to negotiate with any or all offerors as to any or all rental rates, or other terms and conditions of the proposal; to secure proposals in addition to those offered initially in response to this solicitation, without waiving its right to accept the proposal as submitted; or to reject any and all proposals.

Paragraph 7 of the solicitation stated, in pertinent part:

OPENING OF PROPOSAL: This is not a sealed solicitation and proposals
(..continued)
from the existing facility.

² The Postal Service's advertisement in the local newspaper described the preferred area differently, as follows: "Southeast by Spring Street -- East of Spring House; North to Beach Avenue; West to Ocean Avenue; East to Connecticut Avenue; South to Old Town Road; East to Chapel Street/Weldon's Way." The contracting officer asserts that to the extent that the newspaper description and the solicitation description differ, the conflict was apparent before the initial proposal due date and that therefore, a protest against the solicitation's description is untimely, citing Procurement Manual (PM) 4.6.4 b. (previously 4.5.4 b.), which requires that protests "based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals."

The PM edition in effect at the time the solicitation was issued had been promulgated by Transmittal Letter (TL-) 7, June 30, 1993. A new edition of the PM was promulgated by TL-8, effective July 12, 1995. Citations herein are to the TL-8 edition of the PM except as otherwise noted.

will not be publicly opened. Information as to the number of proposals received or the identity of the offerors will not be made available to anyone whose official duties at the Postal Service do not require such knowledge.

Three proposals were received. Federal Properties proposed a site for new construction adjacent to the current post office, located within the solicitation's and the newspaper advertisement's description of the preferred area. The Phillips offer was for a new facility to be built on a site south of Water Street and east of Spring Street which is described more fully below. The relationship of the Phillips site to the preferred area is at dispute in this protest.

The contracting officer's report on the protest indicates that a site review meeting was held on July 24, during which the Phillips offer "was chosen as the preferred location." (The relative standing of the Federal Properties' proposal and the third proposal is not set out in the record.)

Federal Properties submitted to the Postal Service an alternative proposal dated July 24 to expand its present facility. According to the contracting officer, the late proposal was not considered because circumstances suggested to the contracting officer that prior to its receipt, a member of the site review committee had disclosed to the protester the ranking of the three sites.³ Award was made to Phillips on August 4. The Phillips offer was expressed as \$21 rent per square foot; the contracting officer derives from that amount an annual rent of \$98,616 for the 4,696 square feet of net interior space.

In its protest, which was received on August 23, Federal Properties alleges that the award to Phillips is defective for the following reasons:

-- The Phillips site is not within the preferred area as described by the solicitation. Instead, it is "substantially east of the easterly limits of the preferred area." The protester submitted maps showing its interpretation of the preferred area as the geographic area enclosed by the four listed streets (but excluding the New Meadow Hill Swamp which also is contained within that area).

-- It was improper for the contracting officer not to consider the protester's late proposal to modify the existing facility because considering it would not have delayed the procurement and would have been in the best interests of the Postal Service.

-- "One, or both, of our proposals is believed to be better priced than the selected proposal. This does not comport with Postal Service policies and objectives nor with the criteria set forth in Postal Service regulations and

³ The exact time of the receipt of Federal Properties' late proposal is not clear from the record. Nowhere in its extensive submissions to the record has Federal Properties contested the contracting officer's understanding that the rankings of the three previously-received proposals had been disclosed to it. Similarly, it has not suggested that its late proposal was submitted prior to, or independent of, that disclosure.

guidelines."

-- The individual contracting officer who made the award to Phillips was a different person than the contracting officer who had been negotiating with it before the solicitation was issued and whose name appeared on the solicitation. The awarding contracting officer "entered the scene only to make award," lacked authority to make the award, and "proceeded with a bias to relocate from the existing facility."

The protester asks that the award to Phillips be voided and a new solicitation issued."⁴

In his statement in response to the protest, the contracting officer⁵ asserts that the selected site is within the preferred area described in the solicitation because it "abuts Town property on Water Street." He cites section 336.1 of Handbook RE-1, Realty Acquisition and Management, for the proposition that "[s]ites fronting streets forming the boundaries of a preferred area or areas of consideration are considered part of those areas." In the contracting officer's words: "Inasmuch as the 'preferred area' was defined by approximate boundaries, and the selected site abutted a street listed in the preferred area boundaries, I determined that the selected site is within the 'preferred area'."

The contracting officer states that Federal Properties' proposal to renovate the existing site was not considered because the proposal was late and because it followed the improper disclosure to the protester of the ranking of the three already-proposed sites. He states:

I determined that consideration of [the] proposal would give the appearance

⁴ In its protest and in subsequent submissions, the protester also complains extensively that the Postal Service failed to adhere to procedures set out in its internal handbooks, especially with regard to facility planning procedures, alleging that if those procedures had been followed, the result would have been that one of the protester's proposals would have been selected. We will not attempt to resolve the dispute between the contracting officer and the protester about the extent to which the handbook procedures were followed. It is well settled that failure of contracting officers to follow internal instructions does not provide a basis to sustain the protest. As the Comptroller General has stated:

[A]n agency's internal instructions, such as the Forest Service Handbook, do not have the force and effect of law, so that the alleged failure to comply with them in a particular instance involves a matter for consideration within the agency itself, rather than through the bid protest process.

Doug Jones Sawmill, Comp. Gen. Dec. B-239996, September 19, 1990, 90-2 CPD 233; *East West Research, Inc.*, Comp. Gen. Dec. B-238316, April 18, 1990, 90-1 CPD 400.

The protester also submitted a letter dated August 30 in which it delineated additional grounds for protest. In a September 19 reply, those grounds were summarily dismissed because they were untimely raised more than fifteen working days after award; new grounds do not "relate back" to the original protest for timeliness. PM 4.6.4 d.; *Cordant, Inc.*, P.S. Protest No. 94-08, June 23, 1994.

⁵ Our references to "the contracting officer" are to the individual who made the award.

of jeopardizing the integrity of the competitive process. Accordingly, within the discretion afforded me by the Procurement Manual, I declined to consider [it].^[6]

Further, the contracting officer asserts that "any reliance by the protester solely on a better priced proposal is misplaced." He disagrees that the protester's first proposal was better priced than the Phillips offer:

For analysis purposes, the rents were brought to a net present value per square foot offered. Discounted at 8%, the total 20 year base term rent per square foot was \$206 psf for the selected offer [4,071 square feet net floor space with a 625 square foot platform] and \$211 psf for the protester's offer [3,963 square feet of net floor space and a 200 square foot platform].

The contracting officer asserts that Federal Properties' offer also shifted a greater cost burden to the Postal Service over the lease term by taking several exceptions to the lease terms set out in the solicitation. The protester proposed an annual rent of \$97,890.00 for an initial 15-year term and stated that "[s]ubsequent five (5) year options [would] be at market value."⁷ The proposal stated that the rental did not include "payment of real estate taxes [or] maintenance for other than structural and roofing and any additional cost that may be required to modify your standard plans as the Historic District Commission may require" and it deleted other obligations of the lessor under the solicitation. In comparison, "the successful offeror made only one clarification to the terms issued in the Solicitation, stating that the proportion of taxes for which the Postal Service would be responsible would be apportioned after construction." Finally, the contracting officer points out that in any event, under the solicitation's evaluation scheme, price was only one of many factors.⁸

⁶ The contracting officer refers to PM 4.2.3 d.2, which states:

Late proposals . . . may be considered in accordance with Provision A-4, *Late Submissions and Modifications of Proposals*. It is normally in the interest of the Postal Service to consider a late proposal when doing so would cause no delay in the evaluation process, or the proposal was late because of mishandling after receipt, or the proposal offers a significant cost, quality, or technical benefit. It is not in the interest of the Postal Service to consider any proposal received so late that consideration of the proposal would jeopardize, or give the appearance of jeopardizing, the integrity of the competitive process.

⁷ On July 28, the protester submitted an amended proposal which lowered its annual rent to \$86,000.00 for the 20-year base period. The contracting officer states that he did not consider the amended proposal for the same reasons he did not consider the protester's second proposal to renovate the existing facility.

⁸ PM Chapter 11 governs the acquisition of real property, including lease interests in real property. PM 11.4.1 d. states:

Awards made as a result of solicitations for space must be made to the responsible offeror whose proposal is most advantageous to the Postal Service, cost and other evaluation factors set out in the solicitation considered.

Further, the contracting officer states that the successful offeror proposed the only one of the three sites that was not within the boundaries of a 100-year floodplain. Handbook RE-6, Facilities Environmental Handbook, states that construction in the floodplain is contrary to Postal Service policy unless there is "no practicable alternative."⁹

The contracting officer concludes that "[w]ith respect to lease terms" and "overall project economics" the "successful offeror was considered to be superior." He notes that in addition to offering a larger facility with a larger platform, the awardee "provided substantially more parking." The contracting officer denies that there was any "predetermined prejudice" against the present facility.

In reply to the contracting officer's statement, the protester reiterates its arguments that the selected site is not within the preferred area as described in the solicitation. The protester agrees that the solicitation controls over the newspaper advertisement, but argues that neither description includes the chosen site in the preferred area.

The protester also claims that its proposals "meet all applicable floodplain construction design standards" and that "[w]here the development is already in place, and no further impact on or reclamation of a wetland or floodplain is contemplated, RE-6 environmental policies are not implicated."

The protester alleges that the selected property will offer only 25 parking spaces while the solicitation "called for 45 spaces." The existing property has 19, according to the protester, and that could have been increased, if necessary.

Federal Properties disputes the financial analysis of the contracting officer, alleging that it is "undisputed that there is a substantial higher cost with the so-called successful offeror."

Federal Properties asserts that the PM generally does not permit one contracting officer to take over from another, as occurred in this case, because contracting officers are delegated authority only for specific procurements, citing PM 1.5.3 b.¹⁰ Since the current contracting
(..continued)

Section 363.2 of Handbook RE-1 lists factors to consider in evaluating proposals responding to solicitations for space, including the cost of improvements for existing space and costs of new construction projects; site size and expansion capabilities; and accessibility for customers, traffic patterns and congestion.

⁹ Chapter 4 of Handbook 6 implements Executive Order 11988, May 24, 1977, which discourages federal construction within 100-year floodplains. Section 412 of Handbook RE-6 states that it is Postal Service policy that "facility development and construction activities in a 100-year floodplain should be avoided unless there is no practicable alternative." Section 337.3 of Handbook RE-1 337.3 is to the same effect: "Avoid locating postal operations within floodplains unless there are no viable alternatives."

¹⁰ PM 1.5.3 b., which is new, states in pertinent part:

Entering into Contracts. Contracting authority is delegated to named individuals, rather than to positions, on the basis of the individual's education, experience and training.

officer was not assigned this procurement by the vice president of Facilities, he "may not therefore bind the Postal Service" to this contract and the "subject lease is therefore voidable." The protester reiterates its claim that the contracting officer is biased against the protester and its current facility.

In a protest conference and a subsequent written submission which included an additional map the protester restated its arguments with regard to the preferred site area and the authority of the contracting officer, and made the following additional comments:

- A solicitation amendment should have been issued to include the selected site within the preferred area.

- Of the sites "within the preferred area, [its] first proposal ranked number one as disclosed at the debriefing. Clearly, had it not been for the Contracting Officer's improper and arbitrary consideration of the selected site (outside the preferred area), Federal's proposal would have been selected. The Contracting Officer's failure to evaluate Federal's site in accordance with the solicitation criteria was undeniably an abuse of discretion."

- "Any delay in submitting a final offer for the existing facility was . . . occasioned nearly as much by Postal Service inaction" because the protester did not receive the "requested additional information" from the contracting officer which it needed before it could submit a complete offer.

- The successful offeror was granted an extension of time to submit its offer. "[N]o prejudice to the evaluation process would have resulted from consideration of [the protester's offer for the existing facility] within the time in which it was submitted." It was an abuse of discretion to not consider the proposal.

- The protester realizes that resolving disputes over the release of information is outside the jurisdiction of this office, but argues that the contracting officer's "willful noncompliance compels the question of the good faith . . . of his exercise of his

(..continued)

Only individuals with authority so delegated may bind the Postal Service contractually. Postal employees who have not been delegated contracting authority may not bind the Postal Service. . . .

The previous PM edition contained PM 1.5.2 a., which stated:

Authority. Contracting officers have authority to enter into, administer, and terminate contracts and make related decisions. Contracting officers may bind the Postal Service only to the extent of the authority delegated to them. . . .

authority in this solicitation."¹¹

--"A review of the totality of the circumstances of [his] actions in this solicitation may properly provide a basis to conclude that the contracting officer has indeed acted in bad faith."

The protester concludes that it has been prejudiced by the mistakes in this procurement because either of its offers provided "not only superior locational [sic] and factors, but either would have been ranked number one" had the contracting officer not selected a site outside the preferred area which offers less than the protester's sites.

The contracting officer was asked respond to the allegation that he or the previous contracting officer lacked authority to bind the Postal Service to the lease agreement at issue in this case. He responded by submitting documents which show that both he and the other individual hold certificates of appointment as contracting officers and both have been delegated the authority, *inter alia*, to "solicit, award and administer" leasing actions (not greater than \$500,000.00 per year).

The contracting officer was also asked to explain how the Phillips site fell within the preferred area listed in the solicitation, since the map submitted by the protester after the protest conference appeared to indicate that it is not. He responded by alleging that the protester's map is misleading, explaining his understanding of the "preferred area" as follows:

On [my] revision to the protester's map. . . I have highlighted the streets delineating the preferred area. As can be seen, three of the streets intersect at one point, while one street, Water Street, does not intersect with the other three at all. The only reasonable conclusion that can be drawn from the description is that the preferred area was not a neatly described block for consideration, but rather a general, approximate, geographic area, with radiating corridors coincident with the stated streets. Indeed, the adjective "approximately" is included in the description stated in the solicitation. Any offer for a site abutting any of the named streets, as well as any offer within a reasonable distance of the nexus of these streets would have been considered, and all such offers were considered. . . . The [selected] site fronts on Water Street, and is in the generally delineated preferred area. It should have been considered for these reasons alone.

The contracting officer concludes by asserting that there is "nothing contained in the solicitation which prevents the Postal Service from considering sites located outside of the preferred area" and that the "protester's contention lacks merit for this reason."

¹¹ The protester has made numerous requests to the contracting officer for information pursuant to the Freedom of Information Act. The protester also has repeatedly asserted that it did not receive sufficient information in response to its requests. The protester is correct that this office does not resolve conflicts between contracting officials and protesters about the release of information. *Dataware Systems Lease, Inc.*, P.S. Protest No. 91-41, October 10, 1991.

DISCUSSION

Federal Properties' protest challenges the award to Phillips on five grounds. The protester alleges that award was not made in accordance with the solicitation's criteria for the "preferred area"; that the contracting officer lacked the authority to make the award to Phillips; that its proposal to build on the site adjacent to the present post office was improperly evaluated; that the contracting officer was biased against the protester and acted in bad faith; and that it was an abuse of discretion for the contracting officer not to consider Federal Properties' late proposal for expansion of the current post office. We address these allegations in turn.

The protester maintains that the Phillips site is "substantially east" of the preferred area, which the protester interprets as an enclosed area bounded by the streets listed in the solicitation. The contracting officer contends that property which abuts a listed street is within the preferred area even if it is outside the area bounded by those four streets.

The maps submitted in the course of this protest indicate the difficulty with the solicitation's description.¹² That description fails utterly as a boundary, since the purported north and south boundaries are the continuation of the same road, essentially forming the right-hand side of an oval which is intersected by the purported western boundary. The eastern boundary has no relationship with the northern and western boundaries, which lie above it, and only a tenuous connection with the southern boundary, which seems to form its own eastern boundary where it joins the northern boundary.

The newspaper advertisement more closely describes a bounded area.¹³ It encloses an area beginning at the intersection of High Street, Spring Street, and Water Street and extending to the north and west, except for its failure to close between Weldon Way and Spring Street, although it also extends south of the intersection along Spring Street.

The two descriptions are inconsistent since they appear to enclose different areas. The contracting officer contends that the protester has untimely challenged the terms of the solicitation, as any ambiguity in or questions arising from the description could and should

¹² The existing post office and the protester's proposed adjacent site lie at the intersection of Corn Neck Road and Ocean Avenue, with Corn Neck Road proceeding north-northwesterly from the intersection along the shore and Ocean Avenue proceeding west-northwesterly inland. The continuation of Ocean Avenue east of the post office intersection is Dodge Avenue, which intersects Water Street, which runs south easterly to the intersection of High Street and Spring Street, where it (Water Street) turns east to the Old Harbor. The continuation of Corn Neck Road south of the post office is Old Town Road, which starts out running southwestly before angling more westerly past its intersection with Chapel Street.

¹³ Beginning at the Spring House, the description proceeds north up Spring Street, further north along unspecified streets (presumably Water Street to Dodge Street to Corn Neck Road) to Beach Avenue, thence westerly to Ocean Avenue, thence southeasterly to Connecticut Avenue, thence south to Old Town Road, thence east to Chapel Street, continuing east to Weldon Way, west of and parallel to Water Street between Chapel Street and High Street, and thence south.

have been protested before the proposal due date pursuant to PM 4.6.4 b. See footnote 2, *supra*. While that would be correct with respect to the discrepancy between the solicitation's description and the advertisement's description, that appears to be an issue unrelated to the crux of the protester's complaint, which is that the selected site is not within *either* preferred area.

The selected site is clearly not within the preferred area described in the newspaper advertisement, since it lies east of Spring Street at a point where Spring Street forms the easterly border of the enclosed area. It also appears to be outside the preferred area described in the solicitation, since it lies east of the north-south portion of Water Street which is the only part of Water Street which could be taken as an eastern boundary. The site lies south cost of the east-west portion of Water Street east of the High Street-Spring Street intersection and substantially south of any portion of Old Town Road. (The contracting officer's suggestion that the property may be considered under the rule of construction at section 336.1 of Handbook RE-1 is not persuasive; not only does the east-west portion of Water Street not appear to be a "boundar[y] of a preferred area," the selected site does not front Water Street, since it is separated from Water Street by a parcel of town property, obtaining its access to Water Street only from an easement referred to as Adrian House Lane.)

The contracting officer's suggestion that any problem with the solicitation description is irrelevant because the Postal Service was free to consider any property, even outside of the preferred area, is incorrect.¹⁴ The purpose of any solicitation is to inform offerors of exactly what the Postal Service is seeking. See, e.g., *System Advantage, Inc.*, P.S. Protest

¹⁴ The contracting officer cites no authority for this proposition, and section 342.3 of Handbook RE-1, dealing with sites for new lease construction, provides to the contrary:

No Acceptable Sites

If no suitable sites are found within or abutting the preferred area, . . . consider readvertising, but first notify the Field Division General Manger/Postmaster and provide enough real estate information to aid in making a decision whether to revise the boundaries of the preferred area. . . . If the boundaries are changed readvertisement is required.

Cf. S. H. Demarest, P.S. Protest No. 84-1, February 9, 1984, citing former Real Estate and Buildings Bulletin No. RE-83-2, no longer in effect, for a similar proposition.

Another approach would have been for the solicitation to have specified a "larger area of consideration within which a preferred area is further identified" so that if "no suitable sites [were] located within the preferred area, sites offered within the larger area of consideration [could have been] pursued without further advertising." Section 336.1 of Handbook RE-1.

No. 95-08, April 19, 1995.¹⁵ It is not in the interest of the Postal Service for the contracting officer to have a larger area in mind than that which is revealed to the potential lessors of property who would not realize that they qualified. If the larger area is what the Postal Service desired, then the solicitation should have stated it clearly.

The protester's argument that the contracting officer lacked authority because he was the second contracting officer to be associated with this project is without merit. Federal Properties misinterprets PM 1.5.3 b., footnote 10, *supra*, the purpose of which is to establish that only postal employees with specifically delegated contracting authority may bind the Postal Service to a contract. It does not provide that only one duly authorized contracting officer may be involved in an acquisition from project conception to contract award. The contracting officer has demonstrated that he has delegated authority sufficient to bind the Postal Service; PM 1.5.3 b. provides no basis for this office to overturn the award on that basis.¹⁶

The protester claims that its proposal for a facility on the site adjacent to the current post office would have been considered most advantageous to the Postal Service had it been properly evaluated. The choice as to what is in the best interest of the Postal Service "is a business decision within the discretion of the contracting officer and will not be overturned unless the contracting officer has clearly abused his discretion." *See Federal Properties of R.I., Inc.*, P.S. Protest No. 93-02, May 20, 1993; *Georgia Power Company*, P.S. Protest No. 90-01, February 14, 1990. The record in this case does not support the protester's allegations either of arbitrariness or of abuse of discretion.

Further, "[t]he contracting officer has discretion in reviewing the cost proposals of offerors and determining which proposal is evaluated as the lowest cost." *See Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992 ("*Rickenbacker*"). Here, postal analysts concluded that overall "project economics" favored the Phillips site. *See Dattel Realty Company*, P.S. Protest No. 95-1, March 1, 1995.

While the record shows that the protester disagrees with the contracting officer and postal analysts over the relative costs of its proposal and Phillips' (and the comparative benefits of their amenities, such as parking), the protester has not met its burden of proving that the cost or other analyses were incorrect or flawed. *Rickenbacker, supra*. Our review of this record indicates that the contracting officer acted within the scope of his discretion in his evaluation of the cost proposals, *id.*, and we have no basis to overrule his judgment that Phillips' proposal met the other evaluation criteria more advantageously and with more favorable price terms. *Georgia Power, supra*. In a protest involving a site acquisition, this office will not review each decision anew to conclude which opinions have merit; we "will

¹⁵ The selection and weighting of evaluation criteria are duties falling within the contracting officer's discretion. *Service America Corporation*, P.S. Protest No. 91-56, October 30, 1991; *Frederick Manufacturing Company*, P.S. Protest No. 87-13, April 8, 1987. Of course, once the criteria are selected, they must be applied as stated in the solicitation. *Id.*

¹⁶ The result would be the same under the previous PM section, 1.5.2 a., footnote 10 *supra*.

not substitute [our] judgment for that of the contracting officer by making an independent determination of the relative merits of the sites offered." See *F.R. and Lee MacKercher, On Reconsideration, supra*; *Amdahl Corporation*, P.S. Protest No. 81-34, September 29, 1981.¹⁷

The evidence which the protester cites to prove bad faith on the part of the procuring office consists mainly of its opinions of the confidence which may be placed in the analyses and conclusions that the Phillips proposal was more advantageous. While the protester has demonstrated that it held a different opinion than the Postal Service about the relative merits of the proposed sites, disagreement over contested facts and conclusions is not sufficient to overcome the presumption of correctness which attaches to the factual findings of the contracting officer. *Rickenbacker, supra*; *Service America Corp.*, P.S. Protest No. 89-27, August 22, 1989. Moreover, the preference of one site over another is not "bias," and mere disagreement over the comparative worth of proposals does not support a finding of bias or prejudicial motives. *Federal Properties of R.I., supra*. It also does not support a finding that the evaluations were arbitrary or unreasonable, *id.*, and the protester's opinions are insufficient to overcome the presumption that the contracting officer has acted in good faith. The protester has not demonstrated anything close to the "well-nigh irrefragable proof" necessary to overcome that presumption. *Zenith Data Systems, Inc.; Falcon Microsystems, Inc.*, P.S. Protest Nos. 95-19; 95-20, November 22, 1995; *Anthony Owens*, P.S. Protest No. 94-32, September 9, 1994.

On the subject of late proposals, while the PM states that it is "normally in the interest of the Postal Service to consider a late proposal when doing so would cause no delay in the evaluation process. . . or the proposal offers a significant cost, quality, or technical benefit," it also provides that "[i]t is not in the interest of the Postal Service to consider any proposal received so late that consideration of the proposal would jeopardize, or give the appearance of jeopardizing, the integrity of the competitive process." PM 4.2.3 d.2., footnote 6, *supra*.

In the circumstances here (see footnote 6 and accompanying text) it was not an abuse of discretion to decline to consider the protester's late proposal in order to avoid the appearance of jeopardizing the integrity of the process. *Holmes Construction Co., Inc.*, P.S. Protest No. 92-02, February 25, 1992.

Having concluded that the contracting officer erred in concluding that the selected site was within the "preferred area" as outlined in the solicitation, we turn to the issue of the impact, if any, of that error on the protester.¹⁸

¹⁷ The protester's site was ineligible because of its location within the 100-year floodplain, since the Phillips site, not within the floodplain, was a "practicable alternative." See footnote 9, *supra*.

¹⁸ The protester appears to be operating under the impression that any mistake in the procurement requires overturning the award. That impression is incorrect.

Whether to require [corrective] action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good

Contrary to the views which it has expressed, the prejudice to the protester of the contracting officer's error was slight, since the error, if timely corrected, would not have affected the result. *Zenith/Falcon, supra*; see also *Cohlma Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988. The protester has conceded that a solicitation amendment which stated more clearly the Postal Service's preferences could have solved the problem.

Federal Properties claims that it was prejudiced because it was "next in line for award." However, the only support it has offered for that statement is a claim that it was told so in its debriefing and its opinion that its properties are better--that without the alleged mistakes their superior value to the Postal Service would have been obvious. The record fails to indicate that had the Phillips site been unavailable, Federal Properties' site(s) would have been chosen, and indeed contains substantial evidence to the contrary. Since there has been no prejudice in the legal sense, *Zenith/Falcon*; *Cohlma, supra.*, and the other criteria for terminating the Phillips lease have not been met, *id.*, we will not direct the Postal Service to engage in a futile exercise which will leave the protester in the same position in which it finds itself now.

The protest is sustained to the extent indicated.

William J. Jones
Senior Counsel
Contract Protests and Policies

(..continued)

faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.

Zenith/Falcon, supra., citations omitted.